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*Attorneys for Plaintiff*

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

C  
TIMOTHY SMITH, individually and on behalf  
of all others similarly situated,

Plaintiff,

v.

CABOT CREAMERY COOPERATIVE, INC.  
and AGRI-MARK, INC.,

Defendants.

**FILED**

AUG 31 2012

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND

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C12-4591

DMR

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

CLASS ACTION COMPLAINT



**ORIGINAL**

1 Plaintiff Timothy Smith brings this action on behalf of himself and all others similarly  
2 situated against Defendants Cabot Creamery Cooperative, Inc. ("Cabot") and Agri-Mark, Inc.  
3 ("Agri-Mark") (collectively, "Defendants"). Plaintiff makes the following allegations pursuant to  
4 the investigation of his counsel and based upon information and belief, except as to the allegations  
5 specifically pertaining to himself, which are based on personal knowledge.

### 6 NATURE OF ACTION

7 1. This is a class action lawsuit on behalf of purchasers of Cabot Plain Greek-Style  
8 Yogurt, Lowfat Plain Greek-Style Yogurt, Lowfat Blueberry Greek-Style Yogurt, Lowfat Vanilla  
9 Bean Greek-Style Yogurt, Lowfat Strawberry Greek-Style Yogurt, Lowfat Black Cherry Greek-  
10 Style Yogurt, and Lowfat Peach Greek-Style Yogurt (collectively, "Cabot Greek-Style Yogurt" or  
11 "Cabot Greek"), which contain Whey Protein Concentrate ("WPC") and Milk Protein Concentrate  
12 ("MPC"). WPCs and MPCs are not Generally Recognized As Safe, and the FDA has specifically  
13 banned them from use as ingredients in yogurt. Because Cabot Greek contains these banned  
14 additives, as a matter of federal law it is not yogurt. It is adulterated, and it cannot legally be sold  
15 in the United States.

16 2. The manufacture of Greek yogurt is relatively expensive. It is created from  
17 straining the solids after the fermentation of milk, while regular yogurt keeps both the solids and  
18 the liquid. It takes one gallon of milk to produce a gallon of regular yogurt; but it takes four  
19 gallons of milk to produce one gallon of Greek yogurt. The result is a thick, protein-packed yogurt  
20 with a consistency like sour cream. Greek yogurt has nutritional advantages, as it is higher in  
21 protein and lower in sugar than regular yogurt.

22 3. But Cabot Greek is different, because it is not made the way Greek yogurt is  
23 supposed to be made. Instead of filtering out excess liquids, Defendants thicken Cabot Greek by  
24 adding WPCs and MPCs as filler materials. This results in a thicker product that appears to be  
25 Greek yogurt, but in fact is not yogurt at all.

26 4. Just as the mineral pyrite resembles gold, Cabot Greek resembles Greek yogurt. But  
27 fool's gold is not gold. And Cabot Greek is not yogurt.  
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10. At all times relevant to the allegations in this matter, Defendants Cabot and Agri-Mark acted in concert, with the knowledge and approval of the other Defendant and/or as the agent of the other Defendant within the course and scope of the agency, regarding the acts and omissions alleged.

## **JURISDICTION AND VENUE**

11. This Court has subject matter jurisdiction under 28 U.S.C. § 1331. This Court has supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

12. This Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A) because this case is a class action where the aggregate claims of all members of the proposed class are in excess of \$5,000,000.00, exclusive of interest and costs, and Plaintiff, as well as most members of the proposed class, are citizens of states different from the states of at least one of the Defendants. In 2006, annual sales of Greek yogurt in the U.S. were roughly \$60 million, accounting for only 0.7% of the domestic yogurt market. By 2011, U.S. sales of Greek yogurt had increased to \$1.5 billion a year, accounting for nearly 20% of the yogurt market. This means “that in just half a decade, one of the worst economic periods of the 20th century, sales of Greek yogurt grew 2500%.” *Greek Yogurt Sales Rise 2500% in Just Five Years*, HUFFINGTON POST, Aug. 23, 2011, [http://www.huffingtonpost.com/2011/08/23/greek-yogurt-sales\\_n\\_933986.html](http://www.huffingtonpost.com/2011/08/23/greek-yogurt-sales_n_933986.html); *see also* Derek Thompson, *How Did Greek Yogurt Get So Popular?*, THE ATLANTIC, Aug. 23, 2011, <http://www.theatlantic.com/business/archive/2011/08/how-did-greek-yogurt-get-so-popular/244025/>. Sales of Cabot Greek comprised a substantial fraction of these sales.

13. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because a substantial part of the events, omissions and acts giving rise to the claims herein occurred in this District. Plaintiff Smith is a citizen of California, resides in this District, and purchased Cabot Greek from Defendants in this District. Moreover, Defendants distributed, advertised, and sold Cabot Greek, which is the subject of the present complaint, in this District.

## **FACTS COMMON TO ALL CAUSES OF ACTION**

### **How Regular Yogurt Is Made**

14. Yogurt is a dairy product that is produced by the fermentation of milk. When certain types of food-grade bacteria are added to milk, they ferment the milk's lactose (milk sugar) to produce lactic acid. The lactic acid acidifies the milk, which causes it to coagulate and thicken. This acidity gives yogurt its tangy flavor. Yogurt has a longer shelf life than milk, as it is inhospitable to destructive bacteria.

15. Humans have consumed yogurt for thousands of years. Anthropologists and historians believe yogurt originated in Central Asia during the Neolithic age, probably around 5,000 B.C. in Mesopotamia. In this period, milk was stored in bags made from the stomach lining of domesticated animals, where naturally-occurring bacteria and digestive fluids resulted in fermentation. The oldest confirmed writing of yogurt dates to the First Century, when Pliny the Elder of Rome wrote that the "barbarous nations" understood "how to thicken milk and form therefrom an acrid kind of milk with a pleasant flavour." In the Eleventh and Twelfth Centuries, Genghis Khan sustained his armies on yogurt rations. More recently, yogurt was popularized in the United States in the 1950's and 1960's, where health-conscious consumers learned of its nutritional benefits.

16. Yogurt manufacturing today is simple and standardized. First, the milk's fat content is reduced. Second, the milk is heated and homogenized. This process pasteurizes the milk to remove harmful bacteria, and denatures the protein to prevent the creation of clumps (curds). Third, the milk is cooled to 109.4 to 114.8°F and food-grade bacterial cultures are added, typically *Lactobacillus delbrueckii* subsp. *bulgaricus* or *Streptococcus salivarius* subsp. *thermophilus*. Fourth, the temperature is maintained for three to four hours, and fermentation occurs. The bacteria consume lactose and produce lactic acid, which thickens and acidifies the milk. Finally, when the desired pH is achieved, the product is ready for packaging.

### **How Greek Yogurt Is Made**

17. Greek yogurt is thicker than standard yogurt, with a consistency similar to sour cream.

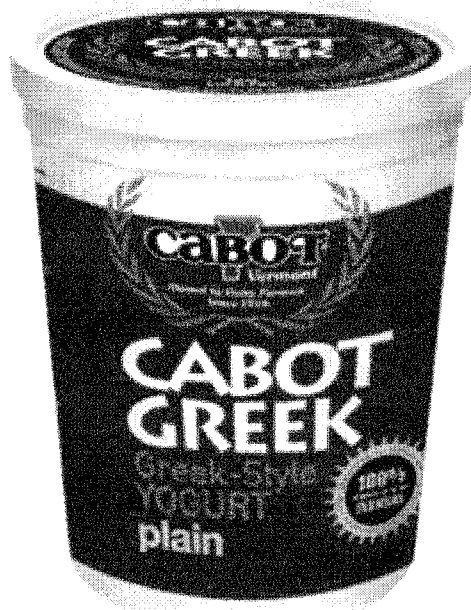
18. To create Greek yogurt, manufacturers use filters to remove the whey, which is the liquid byproduct of yogurt and cheese manufacturing. Basically, regular yogurt keeps both the solid and liquid portions, while Greek yogurt keeps only the solid. Greek yogurt is higher in protein and lower in sugar than regular yogurt because the whey is removed.

19. Unfortunately, Cabot and Agri-Mark took a shortcut. Instead of making Greek yogurt by traditional methods, Cabot Greek is made with thickeners. Defendants added these cheap “filler” materials to avoid the expense of making real Greek yogurt.

**Defendants Represent That Cabot Greek Is “Greek-Style YOGURT,” But They Add Prohibited Ingredients To Cut Costs**

*Defendants Represent That Cabot Greek Is Greek Yogurt*

20. Defendants represent that Cabot Greek is “Greek-Style YOGURT.” This representation appears on the front of the package and on the top of the lid:



21. Additionally, the title of the product (*i.e.*, “Cabot Greek”) leads a reasonable consumer to believe that the product is, in fact, Greek yogurt.

22. Furthermore, the package contains the familiar image of a Grecian laurel wreath surrounding the Cabot logo. This laurel wreath does not appear on Cabot’s other products. The

laurel wreath is a staple of Grecian art and history. For example, laurel wreaths were awarded in ancient Greece to victors in poetic meets and athletic competitions, including the ancient Olympics (this is the origin of the phrase “to rest on one’s laurels”). Defendants intended the inclusion of a Grecian laurel wreath to represent that Cabot Greek is, in fact, authentic Greek yogurt.

23. Cabot’s website represents that Cabot Greek is Greek yogurt. For example, to learn about Cabot Greek, visitors must click a hyperlink entitled “Quality Products,” then click another link entitled “Greek Yogurt.” See Exhibit A.

*Defendants Add Whey Protein Concentrate And Milk Protein Concentrate To Thicken Cabot Greek, Thereby Reducing The Costs Of Production*

24. An examination of Cabot Greek’s ingredients reveals that Defendants add Whey Protein Concentrate (“WPC”) and Milk Protein Concentrate (“MPC”) to their yogurt:

## Nutrition Facts

Serving Size 1 Cup (226g)

Servings Per Container 4

### Amount Per Serving

Calories 290      Calories from Fat 210

% Daily Value

Total Fat 23g      36%

Saturated Fat 15g      73%

Polyunsaturated Fat g

Trans Fat 1g

Cholesterol 75mg      26%

Sodium 105mg      4%

Total Carbohydrate 12g      4%

Dietary Fiber 0g

Sugars 7g

Protein 18g

Vitamin A 25%      Vitamin C 25%

Vitamin D 25%      Vitamin E 25%

Calcium 30%      Iron 4%

Percent Daily Values are based on a 2,000 calorie diet.

Your daily values may be higher or lower depending on your calorie needs.

### Ingredients

Pasteurized milk, cream, whey protein concentrate, milk protein concentrate, live active yogurt cultures (*L. bulgaricus* and *S. thermophilus*), Vitamins A,C,D,E.

1           25. Defendants add WPCs and MPCs to all seven varieties of their Greek yogurt: Plain  
2 Greek-Style Yogurt, Lowfat Plain Greek-Style Yogurt, Lowfat Blueberry Greek-Style Yogurt,  
3 Lowfat Vanilla Bean Greek-Style Yogurt, Lowfat Strawberry Greek-Style Yogurt, Lowfat Black  
4 Cherry Greek-Style Yogurt, and Lowfat Peach Greek-Style Yogurt. *See* Exhibit A.

5           26. WPCs and MPCs are typically created as a byproduct of cheese manufacturing.  
6 After separating the curds from the whey following fermentation, the resulting liquid was  
7 historically discarded. In modern times, the liquid whey is passed through an extremely fine filter.  
8 The filter strains water, minerals, and other organic materials but retains milk proteins, which are  
9 too large to pass through. Any remaining liquid is fully evaporated from these proteins. The  
10 resulting product is a mostly flavorless protein powder.

11           27. This resulting powder is called Whey Protein Concentrate if it primarily contains  
12 whey proteins. It is called Milk Protein Concentrate if it contains whey protein and casein proteins  
13 in the same proportion as it appears in cow's milk (about 20% and 80%, respectively). However,  
14 MPCs and WPCs are not necessarily made from cow's milk. Manufacturers may need to add extra  
15 casein protein to arrive at the correct proportions.

16           28. MPCs and WPCs are often imported from foreign countries, including the Ukraine,  
17 India, China, Argentina, China, Poland, Australia, and New Zealand. Many of these countries have  
18 lower food standards than the U.S.

19           29. MPCs and WPCs are inexpensive. It is cheaper to add WPCs and MPCs to thicken  
20 yogurt, than it is to use more milk.

21           30. WPCs and MPCs are filler material. Instead of fully straining Cabot Greek to arrive  
22 at authentic Greek yogurt, Defendants simply add WPCs and MPCs to thicken their product and  
23 increase the protein content.

24           31. Defendants' conduct is not industry standard. The majority of yogurt brands in the  
25 U.S. do not add WPCs and MPCs.

26           32. Defendants intentionally added WPCs and MPCs to shortchange consumers, and  
27 each Defendant knowingly and intentionally committed the acts alleged herein. First, as discussed  
28 above, it is *not necessary* to add WPCs and MPCs to yogurt. Most domestic manufacturers do not

1 add these ingredients, and there is no plausible reason why these ingredients are needed to make  
 2 Greek yogurt. Second, Defendant Agri-Mark is a commercial manufacturer and distributor of  
 3 WPCs, which it manufactures from its factory in Middlebury, Massachusetts. Defendant Agri-  
 4 Mark warns purchasers on its site that, “*Purchaser is solely responsible for ensuring that product*  
 5 *supplied is in conformity with all relevant food legislation* and should determine whether suggested  
 6 data, formulations or procedures are suitable for their own purposes.” *Agri-Mark Whey Protein*  
 7 *Concentrate 80*, AGRI-MARK.COM, <http://www.agrimarkwheyproteins.com/WPC.php> (emphasis  
 8 added) (attached hereto as Exhibit B). Based on information and belief, Defendant Agri-Mark  
 9 includes this disclaimer because it is aware that adding WPCs to dairy products is prohibited by  
 10 FDA regulations and federal law.

11 33. By adding WPCs and MPCs to their yogurt, Defendants deprive consumers of the  
 12 benefit of their bargain. When consumers purchase Cabot Greek, they expect Greek yogurt. But  
 13 they do not get Greek yogurt. They get a product that contains filler material, violates federal law,  
 14 violates FDA regulations, and is not legal to sell in the U.S.

15 34. Furthermore, consumers are damaged by paying a price premium for supposedly  
 16 Greek yogurt. The amount of the price premium can be reasonably quantified by an appropriate  
 17 market study of the prices for comparable dairy products, or through a contingent valuation study,  
 18 or through other means regularly employed by economic and valuation experts.

19 **Cabot Greek Is Misbranded Because Adding WPCs And MPCs Violates The FDA’s**  
 20 **“Standard Of Identity” For Yogurt**

21 *The FDCA And FDA Standards Of Identity*

22 35. The Federal Food, Drug, and Cosmetic Act (“FDCA”) gives the FDA authority to  
 23 regulate food products. Where “such action will promote honesty and fair dealing in the interest of  
 24 consumers,” the FDA may “promulgate regulations fixing and establishing for any food, under its  
 25 common or usual name so far as practicable, a reasonable definition and standard of identity.” 21  
 26 U.S.C. § 341.

27 36. The FDA’s Standards of Identity define a category of foods, and specifies which  
 28 ingredients may be used. The FDA has promulgated roughly 300 Standards of Identity in 20

categories of food. *See generally* 21 C.F.R. §§ 130-69. This includes all types of dairy products, bakery products, frozen desserts, cereal flours, macaroni products, fruit pies, eggs, and margarine. *Id.*

37. Any food that fails to comply with the Standards of Identity is “misbranded” under the FDCA. *See* 21 U.S.C. § 343 (g) (specifying that if a standard of identity exists, a food is “misbranded” unless “(1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard”). Furthermore, food is misbranded under the FDCA if “its labeling is false or misleading in any particular.” 21 U.S.C. § 343(a).

*The FDA’s Standard Of Identity For Yogurt Is An Exhaustive List Of Ingredients Permitted In Yogurt*

38. In 1981, the FDA promulgated Standards of Identity for yogurt, lowfat yogurt, and nonfat yogurt. 21 C.F.R. §§ 131.200, 131.203, 131.206. They became effective on July 1, 1983. 46 Fed. Reg. 9924; 47 Fed. Reg. 41519.

39. The Standards of Identity for yogurt, lowfat yogurt, and nonfat yogurt are similar. They specify that, “Yogurt is the food produced by culturing one or more of the optional dairy ingredients specified in paragraph (c) of this section with a characterizing bacterial culture that contains the lactic acid-producing bacteria, *Lactobacillus bulgaricus* and *Streptococcus thermophilus*. One or more of the other optional ingredients specified in paragraphs (b) and (d) of this section may also be added. When one or more of the ingredients specified in paragraph (d)(1) of this section are used, they shall be included in the culturing process. All ingredients used [must be] safe and suitable.” 21 C.F.R. § 131.200(a).

40. The “optional dairy ingredients” that may be cultured under paragraph (c) are, “Cream, milk, partially skimmed milk, or skim milk, used alone or in combination.” 21 C.F.R. § 131.200(c). Paragraph (b) permits the addition of vitamin A and D. Paragraph (d) permits the addition of a number of assorted ingredients, including, “(1) Concentrated skim milk, nonfat dry milk, buttermilk, whey, lactose, lactalbumins, lactoglobulins, or whey modified by partial or complete removal of lactose and/or minerals.... (2) Nutritive carbohydrate sweeteners. Sugar (sucrose), beet or cane; invert sugar (in paste or sirup form); brown sugar; refiner’s sirup; molasses

(other than blackstrap); high fructose corn sirup; fructose; fructose sirup; maltose; maltose sirup, dried maltose sirup; malt extract, dried malt extract; malt sirup, dried malt sirup; honey; maple sugar.... (3) Flavoring ingredients. (4) Color additives. (5) Stabilizers.” 21 C.F.R. § 131.200(d).

41. In totality, the Standard of Identity for yogurt is an *exclusive list* of ingredients that may be added to yogurt. If “yogurt” contains any ingredient not on that list, as a matter of federal law it is not yogurt, and it is misbranded. 21 C.F.R. §§ 131.200, 131.203, 131.206; 21 U.S.C. § 343 (a), (g).

*The FDA’s Standard Of Identity For Yogurt Prohibits The Addition Of WPCs And MPCs*

42. The FDA’s Standard of Identity for yogurt does not list WPCs or MPCs in the list of permitted ingredients. In fact, both are specifically prohibited.

43. The FDA has specifically banned the use of WPCs and MPCs in yogurt. *See* 74 Fed. Reg. 2443, 2452-53 (2009) (“[T]he current standard makes no allowance for the use of whey protein concentrate as a basic ingredient in yogurt.”); *see also* Dec. 18, 2002 FDA Warning Letter to Kraft Foods North America Inc., <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2002/ucm145363.htm> (accessed July 30, 2012) (“The use of milk protein concentrate in these products constitutes a violation of Section 403(g)(1) of the Act because the products are represented as foods for which standards of identity have been prescribed by regulation and the use of milk protein concentrate in these products does not conform to the standards.”).

**Cabot Greek Is Adulterated Because WPCs and MPCs Are Not “Generally Recognized As Safe” By The FDA**

44. Under the FDCA, food additives must be Generally Recognized As Safe (“GRAS”) by the FDA.

45. If the FDA has not made a GRAS determination, manufacturers may use the additive if and only if they conduct an internal self-determination and submit their evidence to the FDA, including the manufacturer’s own scientific evidence.

46. Any food containing an additive that has not followed these producers is adulterated under the FDCA, which defines food additives as “all substances ... the intended use of which

1 results or may reasonably be expected to result ... in their becoming a component or food  
2 otherwise affecting the characteristic of food.” 21 U.S.C. § 321(s).

3 47. WPCs and MPCs do not have GRAS status. Neither is found in the FDA’s  
4 Database of Select Committee on GRAS Substances (SCOGS) Reviews.

5 48. Because MPCs do not appear in the FDA’s GRAS Notice Inventory, no  
6 manufacturer has conducted an internal self-determination of MPCs, nor has the FDA ever  
7 received a manufacturer’s self-determination. Furthermore, MPCs do not appear in the FDA’s  
8 larger list of food additives, Everything Added to Food in the United States (“EAFUS”).

9 49. Because Cabot Greek contains unapproved additives, it is adulterated. It violates  
10 the FDCA and applicable regulations thereunder.

11 **Timothy Smith’s Purchase Of Cabot Greek**

12 50. Plaintiff Timothy Smith purchased Cabot Greek-Style Yogurt in 2012 from local  
13 supermarkets near his home in Berkeley, California. Cabot Greek’s label identifies the product as  
14 “Greek-Style YOGURT” in two places: on the front of the package and on the top of the lid.  
15 Plaintiff Smith read and understood these representations and believed he was purchasing (i)  
16 yogurt (ii) that was in fact Greek yogurt, (iii) that was not adulterated, and (iv) that was legal for  
17 sale in the United States.

18 51. Mr. Smith relied on these representations and warranties in deciding whether to  
19 purchase Cabot Greek, and these representations and warranties were part of the basis of the  
20 bargain, in that he would not have purchased Cabot Greek if he had known that any of the these  
21 representations were false.

22 52. Mr. Smith also understood that in making the sale, the retailer was acting with the  
23 knowledge and approval of Defendants and/or as the agent of Defendants. He understood that the  
24 purchase involved a direct transaction between himself and Defendants, because Cabot Greek’s  
25 packaging contains promises and representations by Defendants regarding the nature and quality of  
26 the product.

27 53. Mr. Smith purchased a misbranded product that is not legal to sell in the United  
28 States. He also paid a price premium due to Cabot Greek’s purported status as a Greek yogurt

1 product, as well as its purported status as a lowfat yogurt product. The amount of the price  
2 premium can be reasonably quantified by an appropriate market study of the prices for comparable  
3 dairy products, or through a contingent valuation study, or through other means regularly employed  
4 by economic and valuation experts.

#### 5 **CLASS REPRESENTATION ALLEGATIONS**

6 54. Plaintiff seeks to represent a class defined as all persons in the United States who  
7 purchased Cabot Greek (the "Class"). Excluded from the Class are persons who made such  
8 purchase for purpose of resale.

9 55. Plaintiff also seeks to represent a subclass of all Class members who purchased  
10 Cabot Greek in California (the "California Subclass").

11 56. Members of the Class and Subclass are so numerous that their individual joinder  
12 herein is impracticable. On information and belief, members of the Class and Subclass number in  
13 the hundreds of thousands. The precise number of Class members and their identities are unknown  
14 to Plaintiff at this time but may be determined through discovery. Class members may be notified  
15 of the pendency of this action by mail and/or publication through the distribution records of  
16 Defendants and third party retailers and vendors.

17 57. Common questions of law and fact exist as to all Class members and predominate  
18 over questions affecting only individual Class members. Common legal and factual questions  
19 include, but are not limited to whether Defendants warranted that Cabot Greek (i) was yogurt, (ii)  
20 was in fact Greek yogurt, (iii) was not adulterated, and (iv) was legal for sale in the United States;  
21 whether Defendants breached those warranties; and whether defendants committed statutory and  
22 common law fraud by doing so.

23 58. The claims of the named Plaintiff are typical of the claims of the Class in that the  
24 named Plaintiff purchased Cabot Greek in reliance on the representations and warranties described  
25 above, and suffered a loss as a result of that purchase.

26 59. Plaintiff is an adequate representative of the Class and Subclass because his interests  
27 do not conflict with the interests of the Class members he seeks to represent, he has retained  
28 competent counsel experienced in prosecuting class actions, and he intends to prosecute this action

1 vigorously. The interests of Class members will be fairly and adequately protected by Plaintiff and  
2 his counsel.

3 60. The class mechanism is superior to other available means for the fair and efficient  
4 adjudication of the claims of Class and Subclass members. Each individual Class member may  
5 lack the resources to undergo the burden and expense of individual prosecution of the complex and  
6 extensive litigation necessary to establish Defendants' liability. Individualized litigation increases  
7 the delay and expense to all parties and multiplies the burden on the judicial system presented by  
8 the complex legal and factual issues of this case. Individualized litigation also presents a potential  
9 for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer  
10 management difficulties and provides the benefits of single adjudication, economy of scale, and  
11 comprehensive supervision by a single court on the issue of Defendants' liability. Class treatment  
12 of the liability issues will ensure that all claims and claimants are before this Court for consistent  
13 adjudication of the liability issues.

## 14 COUNT I

### 15 **Breach Of Express Warranty**

16 61. Plaintiff hereby incorporates by reference the allegations contained in all preceding  
17 paragraphs of this complaint.

18 62. Plaintiff brings this claim individually and on behalf of the members of the  
19 proposed Class against all Defendants.

20 63. Defendants, as the designer, manufacturer, marketers, distributors, and/or sellers  
21 expressly warranted that Cabot Greek was fit for its intended purpose by representing that Cabot  
22 Greek (i) was yogurt, (ii) was in fact Greek yogurt, (iii) was not adulterated, and (iv) was legal for  
23 sale in the United States.

24 64. In fact, Cabot Greek is not fit for such purposes because each of these express  
25 warranties is false. Particularly, Cabot Greek (i) is not yogurt, (ii) is not Greek yogurt, (iii) is  
26 adulterated, and (iv) is illegal for sale in the United States.

27 65. As a direct and proximate cause of Defendants' breach of express warranty, Plaintiff  
28 and Class members have been injured and harmed because: (a) they would not have purchased

1 Cabot Greek on the same terms if the true facts were known concerning its manufacturing,  
2 ingredients, status as a yogurt product, and failure to comply with FDA regulations; (b) they paid a  
3 price premium for Cabot Greek due to its supposed status as "Greek-Style YOGURT;" and (c)  
4 Cabot Greek did not have the quality, functionality, or value as promised.

5 66. On August 30, 2012, prior to the filing of this Complaint, a notice letter was served  
6 on Defendant Cabot which complies in all respects with Cal. Com. Code § 2607. Plaintiff Smith  
7 sent Cabot a letter via certified mail, return receipt requested, advising Cabot that it was in  
8 violation of California warranty law and must correct, repair, replace or otherwise rectify the goods  
9 alleged to be in violation. A true and correct copy of Plaintiff Smith's letter is attached hereto as  
10 Exhibit C.

## 11 **COUNT II**

### 12 **Breach Of Implied Warranty Of Merchantability**

13 67. Plaintiff hereby incorporates by reference the allegations contained in all preceding  
14 paragraphs of this complaint.

15 68. Plaintiff brings this claim individually and on behalf of the members of the  
16 proposed Class against all Defendants.

17 69. Defendants as the designer, manufacturer, marketers, distributors, and/or sellers  
18 impliedly warranted that Cabot Greek was fit for its intended purpose in that it (i) was yogurt, (ii)  
19 was in fact Greek yogurt, (iii) was not adulterated, and (iv) was legal for sale in the United States.

20 70. Defendants breached the warranty implied in the contract for the sale of Cabot  
21 Greek because it could not pass without objection in the trade under the contract description, the  
22 goods were not of fair average quality within the description, and the goods were unfit for their  
23 intended and ordinary purpose because Cabot Greek (i) is not yogurt, (ii) is not Greek yogurt, (iii)  
24 is adulterated, and (iv) is illegal for sale in the United States. As a result, Plaintiff and Class  
25 members did not receive the goods as impliedly warranted by Defendants to be merchantable.

26 71. In reliance upon Defendants' skill and judgment and the implied warranties of  
27 fitness for the purpose, Plaintiff and Class members purchased Cabot Greek as a Greek-style  
28 yogurt.

72. Cabot Greek was not altered by Plaintiff or Class members.

73. Cabot Greek was defective when it left the exclusive control of Defendants.

74. Defendants knew that Cabot Greek would be purchased and used without additional testing by Plaintiff and Class members.

75. Cabot Greek was defectively designed and unfit for its intended purpose, and Plaintiff and Class members did not receive the goods as warranted.

76. As a direct and proximate cause of Defendants' breach of the implied warranty, Plaintiff and Class members have been injured and harmed because: (a) they would not have purchased Cabot Greek on the same terms if the true facts were known concerning its manufacturing, ingredients, status as a yogurt product, and failure to comply with FDA regulations; (b) they paid a price premium for Cabot Greek due to its supposed status as "Greek-Style YOGURT;" and (c) Cabot Greek did not have the quality, functionality, or value as promised.

### **COUNT III**

#### **Breach Of Implied Warranty Of Fitness For A Particular Purpose**

77. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

78. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against all Defendants.

79. Defendants marketed, distributed, and/or sold Cabot Greek with implied warranties that it was fit for its intended purposes in that it (i) was yogurt, (ii) was in fact Greek yogurt, (iii) was not adulterated, and (iv) was legal for sale in the United States. At the time that Cabot Greek was sold, Defendants knew or had reason to know that Plaintiff and Class members were relying on Defendants' skill and judgment to select or furnish a product that was suitable for sale as Greek yogurt.

80. In reliance upon Defendants' implied warranties, Plaintiff and Class members purchased Cabot Greek because they believed that it was Greek yogurt.

81. Cabot Greek was not altered by Plaintiff or Class members.

## Unjust Enrichment

84. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against all Defendants.

85. Plaintiff and Class members conferred benefits on Defendants by purchasing Cabot Greek.

86. Defendants have been unjustly enriched in retaining the revenues derived from Plaintiff and Class members' purchases of Cabot Greek. Retention of those moneys under these circumstances is unjust and inequitable because Defendants misrepresented that Cabot Greek was "Greek-Style YOGURT," which caused injuries to Plaintiff and Class members because they would not have purchased Cabot Greek if the true facts were known.

87. Because Defendants' retention of the non-gratuitous benefits conferred on them by Plaintiff and Class members is unjust and inequitable, Defendants must pay restitution to Plaintiff and Class members for their unjust enrichment, as ordered by the Court.

### **Violation Of California’s Consumers Legal Remedies Act (“CLRA”),**

**California Civil Code §§ 1750, *et seq.***

**(Injunctive Relief Only)**

88. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

1           89. Plaintiff brings this claim individually and on behalf of the members of the  
2 proposed California Subclass against all Defendants.

3           90. CLRA § 1770(a)(2) prohibits “[m]isrepresenting the source, sponsorship, approval,  
4 or certification of goods or services.”

5           91. CLRA § 1770(a)(5) prohibits “[r]epresenting that goods or services have  
6 sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not  
7 have or that a person has a sponsorship, approval, status, affiliation, or connection which he or she  
8 does not have.”

9           92. CLRA § 1770(a)(7) prohibits “[r]epresenting that goods or services are of a  
10 particular standard, quality, or grade, or that goods are of a particular style or model, if they are of  
11 another.”

12           93. CLRA § 1770(a)(9) prohibits “advertising goods or services with intent not to sell  
13 them as advertised.”

14           94. Defendants violated each of these provisions by misrepresenting that Cabot Greek  
15 (i) was yogurt, (ii) was in fact Greek yogurt, (iii) was not adulterated, and (iv) was legal for sale in  
16 the United States.

17           95. Plaintiff and the California Subclass suffered injuries caused by Defendants  
18 because: (a) they would not have purchased Cabot Greek on the same terms if the true facts were  
19 known concerning its manufacturing, ingredients, status as a yogurt product, and failure to comply  
20 with FDA regulations; (b) they paid a price premium for Cabot Greek due to its supposed status as  
21 “Greek-Style YOGURT;” and (c) Cabot Greek did not have the quality, functionality, or value as  
22 promised.

23           96. On or about August 30, 2012, prior to filing this action, a CLRA notice letter was  
24 served on Defendants which complies in all respects with California Civil Code § 1782(a).  
25 Plaintiff Smith sent Cabot a letter via certified mail, return receipt requested, advising Cabot that it  
26 is in violation of the CLRA and demanding that it cease and desist from such violations and make  
27 full restitution by refunding the monies received therefrom. A true and correct copy of Plaintiff  
28 Smith’s letter is attached hereto as Exhibit C.

**Violation Of California’s Unfair Competition Law (“UCL”),  
California Business & Professions Code §§ 17200, *et seq.***

99. Plaintiff brings this claim individually and on behalf of the members of the proposed California Subclass against all Defendants.

101. Defendants' misrepresentations and other conduct, described herein, violated the "unlawful" prong of the UCL by violating the CLRA as described herein; the FAL as described herein; and Cal. Com. Code § 2607.

103. Defendants' conduct, described herein, violated the "fraudulent" prong of the UCL by making misrepresentations about Cabot Greek.

104. Plaintiff and the California Subclass lost money or property as a result of Defendants' UCL violations because: (a) they would not have purchased Cabot Greek on the same terms if the true facts were known concerning its manufacturing, ingredients, status as a yogurt product, and failure to comply with FDA regulations; (b) they paid a price premium for Cabot

1 Greek due to its supposed status as “Greek-Style YOGURT;” and (c) Cabot Greek did not have the  
2 quality, functionality, or value as promised.

### 3 COUNT VII

#### 4 **Violation Of California’s False Advertising Law (“FAL”),** 5 **Calif. Business & Professions Code §§17500, *et seq.***

6 105. Plaintiff hereby incorporates by reference the allegations contained in all preceding  
7 paragraphs of this complaint.

8 106. Plaintiff brings this claim individually and on behalf of the members of the  
9 proposed California Subclass against all Defendants.

10 107. California’s False Advertising Law, Bus. & Prof. Code §§ 17500, *et seq.*, makes it  
11 “unlawful for any person to make or disseminate or cause to be made or disseminated before the  
12 public in this state, ... in any advertising device ... or in any other manner or means whatever,  
13 including over the Internet, any statement, concerning ... personal property or services, professional  
14 or otherwise, or performance or disposition thereof, which is untrue or misleading and which is  
15 known, or which by the exercise of reasonable care should be known, to be untrue or misleading.”

16 108. Defendants committed acts of false advertising, as defined by §17500, by  
17 misrepresenting that Cabot Greek (i) was yogurt, (ii) was in fact Greek yogurt, (iii) was not  
18 adulterated, and (iv) was legal for sale in the United States.

19 109. Defendants knew or should have known, through the exercise of reasonable care  
20 that their representations about Cabot Greek were untrue and misleading.

21 110. Defendants’ actions in violation of § 17500 were false and misleading such that the  
22 general public is and was likely to be deceived.

23 111. Plaintiff the California Subclass lost money or property as a result of Defendants’  
24 FAL violations because: (a) they would not have purchased Cabot Greek on the same terms if the  
25 true facts were known concerning its manufacturing, ingredients, status as a yogurt product, and  
26 failure to comply with FDA regulations; (b) they paid a price premium for Cabot Greek due to its  
27 supposed status as “Greek-Style YOGURT;” and (c) Cabot Greek did not have the quality,  
28 functionality, or value as promised.

**COUNT VIII****Negligent Misrepresentation**

112. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

113. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against all Defendants.

114. As discussed above, Defendants represented that Cabot Greek was “Greek-Style YOGURT” but failed to disclose that it (i) is not yogurt, (ii) is not Greek yogurt, (iii) is adulterated, and (iv) is illegal for sale in the United States. Defendants had a duty to disclose this information.

115. At the time Defendants made these representations, Defendants knew or should have known that these representations were false or made them without knowledge of their truth or veracity.

116. At an absolute minimum, Defendants negligently misrepresented and/or negligently omitted material facts about Cabot Greek.

117. The negligent misrepresentations and omissions made by Defendants, upon which Plaintiff and Class members reasonably and justifiably relied, were intended to induce and actually induced Plaintiff and Class members to purchase Cabot Greek.

118. Plaintiff and Class members would not have purchased Cabot Greek if the true facts had been known.

119. The negligent actions of Defendants caused damage to Plaintiff and Class members, who are entitled to damages and other legal and equitable relief as a result.

**COUNT IX****Fraud**

120. Plaintiff hereby incorporates by reference the allegations contained in all preceding paragraphs of this complaint.

121. Plaintiff brings this claim individually and on behalf of the members of the proposed Class against all Defendants.

122. As discussed above, Defendants provided Plaintiff and Class members with false or misleading material information and failed to disclose material facts about Cabot Greek, including but not limited to the fact that it (i) is not yogurt, (ii) is not Greek yogurt, (iii) is adulterated, and (iv) is illegal for sale in the United States. These misrepresentations and omissions were made with knowledge of their falsehood.

123. The misrepresentations and omissions made by Defendants, upon which Plaintiff and Class members reasonably and justifiably relied, were intended to induce and actually induced Plaintiff and Class members to purchase Cabot Greek.

124. The fraudulent actions of Defendants caused damage to Plaintiff and Class members, who are entitled to damages and other legal and equitable relief as a result.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks judgment against Defendants, as follows:

- a. For an order certifying the nationwide Class and the Subclass under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff as representative of the Class and Subclass and Plaintiff's attorneys as Class Counsel to represent the Class and Subclass members;
- b. For an order declaring the Defendants' conduct violates the statutes referenced herein;
- c. For an order finding in favor of Plaintiff, the nationwide Class, and the Subclass on all counts asserted herein;
- d. For compensatory and punitive damages in amounts to be determined by the Court and/or jury;
- e. For prejudgment interest on all amounts awarded;
- f. For an order of restitution and all other forms of equitable monetary relief;
- g. For injunctive relief as pleaded or as the Court may deem proper; and
- h. For an order awarding Plaintiff and the Class and Subclass his reasonable attorneys' fees and expenses and costs of suit.

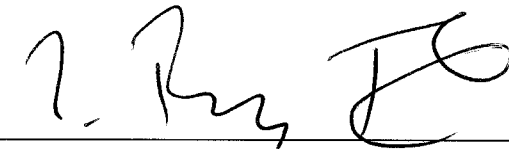
**DEMAND FOR TRIAL BY JURY**

Plaintiff demands a trial by jury of all issues so triable.

Dated: August 31, 2012

Respectfully submitted,

**BURSOR & FISHER, P.A.**

By:   
L. Timothy Fisher

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Sarah N. Westcot (State Bar No. 264916)  
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E-Mail: scott@bursor.com

*Attorneys for Plaintiff*

1 I, Timothy Smith, declare as follows:

2 1. I am a plaintiff in this action and a citizen of the State of California. I have personal  
3 knowledge of the facts stated herein and, if called as a witness, I could and would testify  
4 competently thereto.

5 2. The complaint filed in this action is filed in the proper place for trial under  
6 California Civil Code Section 1780(d) in that Defendants conduct a substantial amount of business  
7 in this District.

8 3. While living in California, I purchased Cabot Greek for personal consumer use. I  
9 read the label on Cabot Greek, and purchased it in reliance on the claims that I was purchasing (i)  
10 yogurt (ii) that was in fact Greek yogurt, (iii) that was not adulterated, and (iv) that was legal for  
11 sale in the United States. I would not have purchased Cabot Greek had I known the true facts  
12 concerning its manufacturing, ingredients, status as a yogurt product, and failure to comply with  
13 FDA regulations.  
14

15 I declare under the penalty of perjury under the laws of the State of California that the  
16 foregoing is true and correct, executed on August 29, 2012 at Walnut Creek, California.  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

  
TIMOTHY SMITH



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Classic Cheddar Specialty Aged Cheddar Flavored Cheddar Reduced Fat Cheddar Other Cheeses Greek Yogurt Other Products

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**Store Finder**

**Cabot e-Newsletter**

**FAQs**

**HUNGRY? SEARCH RECIPES BY MEAL TYPE**

Select a category



#### Cheese

- Classic Cheddar
- Specialty Aged Cheddar
- Flavored Cheddar
- Reduced Fat Cheddar
- Other Cheeses

#### Greek Yogurt

- Plain
- Lowfat Plain
- Lowfat Blueberry
- Lowfat Vanilla Bean
- Lowfat Strawberry
- Lowfat Black Cherry
- Lowfat Peach

#### Other Products

- Cream Cheese
- Whipped Cream
- Cottage Cheese
- Dips
- Sour Cream
- Butter
- Nonfat Yogurt

Plain Lowfat Plain Lowfat Blueberry Lowfat Vanilla Bean Lowfat Strawberry Lowfat Black Cherry Lowfat Peach

## Plain Greek-Style Yogurt

Greek-Style Yogurt is a thick, creamy, decadent yogurt that is equally enjoyable by itself, as a rub, or as an ingredient in rich, creamy sauces, dips or main dishes. Greek-Style Yogurt has countless uses as an ingredient in recipes. It can be used for baking, as a substitute for sour cream or cream, or as a base for dips and sauces.

1 1



#### Product Options

1 LB 2 LBS

#### Product FAQ

#### Recipes

#### Store Finder

Search by Product	Search by Location
<b>Product Type:</b> Plain Greek-Style Yogurt	<b>City:</b>
<b>Options:</b> Any	<b>State:</b>
<b>Zip Code:</b>	<b>Distance:</b> Less than 10 Miles
<input type="button" value="Submit"/>	<input type="button" value="Submit"/>

If you can't find what you're looking for, ask your local store manager to begin carrying Cabot products.

## Nutrition Facts

Serving Size 1 Cup (226g)

Servings Per Container 2

Amount Per Serving	
Calories 290	Calories from Fat 210
% Daily Value	
Total Fat 23g	36%
Saturated Fat 15g	73%
Polyunsaturated Fat g	
Trans Fat 1g	
Cholesterol 75mg	26%
Sodium 105mg	4%
Total Carbohydrate 12g	4%
Dietary Fiber 0g	
Sugars 7g	
Protein 18g	
Vitamin A 25%	Vitamin C 25%
Vitamin D 25%	Vitamin E 25%
Calcium 30%	Iron 4%

Percent Daily Values are based on a 2,000 calorie diet.

Your daily values may be higher or lower depending on your calorie needs.

#### Ingredients

Pasteurized milk, cream, whey protein concentrate, milk protein concentrate, live active yogurt cultures (L. bulgaricus and S. thermophilus), Vitamins A,C,D,E.





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Quicklinks

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FAQs

HUNGRY? SEARCH RECIPES BY MEAL TYPE

Select a category



#### Cheese

- Classic Cheddar
- Specialty Aged Cheddar
- Flavored Cheddar
- Reduced Fat Cheddar
- Other Cheeses

#### Greek Yogurt

- Plain
- Lowfat Plain
- Lowfat Blueberry
- Lowfat Vanilla Bean
- Lowfat Strawberry
- Lowfat Black Cherry
- Lowfat Peach

#### Other Products

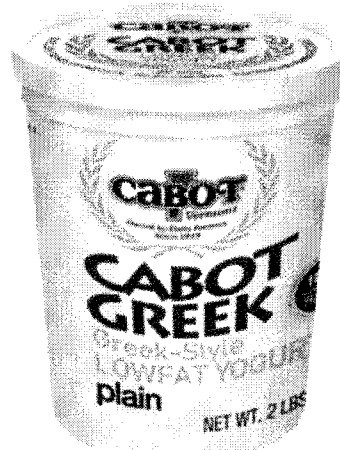
- Cream Cheese
- Whipped Cream
- Cottage Cheese
- Dips
- Sour Cream
- Butter
- Nonfat Yogurt

Plain **Lowfat Plain** Lowfat Blueberry Lowfat Vanilla Bean Lowfat Strawberry Lowfat Black Cherry Lowfat Peach

## Lowfat Plain Greek-Style Yogurt

Greek-Style Yogurt is a thick, creamy, decadent yogurt that is equally enjoyable by itself, as a rub, or as an ingredient in rich, creamy sauces, dips or main dishes. Greek-Style Yogurt has countless uses as an ingredient in recipes. It can be used for baking, as a substitute for sour cream or cream, or as a base for dips and sauces. Made from 2% lowfat milk.

Like 9



#### Product Options

1 LB 2 LBS

#### Product FAQ

#### Recipes

#### Store Finder

Search by Product	Search by Location
Product Type:	City:
Lowfat Plain Greek-Style Yogurt	State:
Options: Any	Distance: Less than 10 Miles
Zip Code:	
<input type="button" value="Submit"/>	<input type="button" value="Submit"/>

If you can't find what you're looking for, ask your local store manager to begin carrying Cabot products.

## Nutrition Facts

Serving Size 1 cup (226g)  
Servings Per Container 2

Amount Per Serving	
Calories 150	Calories from Fat 45
% Daily Value	
Total Fat 5g	7%
Saturated Fat 3g	15%
Polyunsaturated Fat g	
Trans Fat 0g	
Cholesterol 35mg	11%
Sodium 120mg	5%
Total Carbohydrate 11g	4%
Dietary Fiber 0g	
Sugars 11g	
Protein 22g	
Vitamin A 25%	Vitamin C 25%
Vitamin D 25%	Vitamin E 25%
Calcium 40%	Iron 6%

Percent Daily Values are based on a 2,000 calorie diet.

Your daily values may be higher or lower depending on your calorie needs.

#### Ingredients

Pasteurized milk, skim milk, whey protein concentrate, milk protein concentrate, pectin, live active yogurt cultures (L. bulgaricus and S. thermophilus), enzymes, Vitamins A, C, D, E.



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HUNGRY? SEARCH RECIPES BY MEAL TYPE

Select a category



#### Cheese

- Classic Cheddar
- Specialty Aged Cheddar
- Flavored Cheddar
- Reduced Fat Cheddar
- Other Cheeses

#### Greek Yogurt

- Plain
- Lowfat Plain
- Lowfat Blueberry
- Lowfat Vanilla Bean
- Lowfat Strawberry
- Lowfat Black Cherry
- Lowfat Peach

#### Other Products

- Cream Cheese
- Whipped Cream
- Cottage Cheese
- Dips
- Sour Cream
- Butter
- Nonfat Yogurt

Plain Lowfat Plain **Lowfat Blueberry** Lowfat Vanilla Bean Lowfat Strawberry Lowfat Black Cherry Lowfat Peach

## Lowfat Blueberry Greek-Style Yogurt

Rich, creamy, and bursting-with-blueberries delicious. Cabot's new Lowfat Blueberry Greek-Style Yogurt is so good it's "as tempting as a siren's call." And so good for you, too made from 2% low-fat milk, every luscious, protein-rich spoonful is fortified with vitamins A, C, D and E.

Like 0



#### Product Options

1 LB 2 LBS

#### Store Finder

##### Search by Product

Product Type:

Lowfat Blueberry Greek-Style Yogurt

Options:

Any

Zip Code:

Submit

##### Search by Location

City:

State:

Distance:

Less than 10 Miles

Submit

If you can't find what you're looking for, ask your local store manager to begin carrying Cabot products.

## Nutrition Facts

Serving Size 1 Cup (226g)  
Servings Per Container 2

Amount Per Serving	
Calories 230	Calories from Fat 40
% Daily Value	
Total Fat 4g	6%
Saturated Fat 2.5g	13%
Polyunsaturated Fat 0g	
Mono Saturated Fat 0g	
Trans Fat 0g	0%
Cholesterol 25mg	8%
Sodium 115mg	5%
Total Carbohydrate 32g	11%
Potassium 0mg	0%
Dietary Fiber 0g	
Sugars 26g	
Protein 18g	36%
Vitamin A 20%	Vitamin B 0%
Vitamin C 20%	Vitamin D 20%
Vitamin E 20%	Calcium 45%
Iron 4%	Riboflavin 0%

Percent Daily Values are based on a 2,000 calorie diet.

Your daily values may be higher or lower depending on your calorie needs.

#### Ingredients

Lowfat yogurt (Pasteurized milk, skim milk, whey protein concentrate, milk protein concentrate, live active yogurt cultures (Acidophilus, Bifidus, L. bulgaricus and S. thermophilus), enzymes, Vitamins A,C,D,E), Blueberry flavoring (Sugar, blueberries, water, modified corn starch, natural flavors, pectin, concentrated lemon juice).



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**HUNGRY? SEARCH RECIPES BY MEAL TYPE**

Select a category



#### Cheese

- Classic Cheddar
- Specialty Aged Cheddar
- Flavored Cheddar
- Reduced Fat Cheddar
- Other Cheeses

#### Greek Yogurt

- Plain
- Lowfat Plain
- Lowfat Blueberry
- Lowfat Vanilla Bean
- Lowfat Strawberry
- Lowfat Black Cherry
- Lowfat Peach

#### Other Products

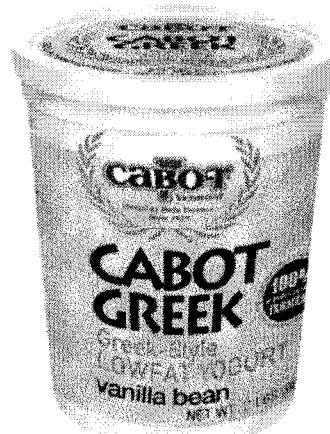
- Cream Cheese
- Whipped Cream
- Cottage Cheese
- Dips
- Sour Cream
- Butter
- Nonfat Yogurt

Plain Lowfat Plain Lowfat Blueberry **Lowfat Vanilla Bean** Lowfat Strawberry Lowfat Black Cherry Lowfat Peach

## Lowfat Vanilla Bean Greek-Style Yogurt

Cabot's Greek-Style Yogurt makes a healthy protein-rich treat when blended with fresh fruits for quick and yummy smoothies. Use our lowfat Vanilla Bean, because vanilla just seems to make fruit flavors bloom. Made from 2% lowfat milk.

Like 82



#### Product Options

1 LB 2 LBS

#### Product FAQ

#### Store Finder

Search by Product	Search by Location
<b>Product Type:</b> Lowfat Vanilla Bean Greek-Style Yogi	<b>City:</b>
<b>Options:</b> Any	<b>State:</b>
<b>Zip Code:</b>	<b>Distance:</b> Less than 10 Miles
<input type="button" value="Submit"/>	<input type="button" value="Submit"/>

If you can't find what you're looking for, ask your local store manager to begin carrying Cabot products.

## Nutrition Facts

Serving Size 1 Cup (226g)

Servings Per Container 2

#### Amount Per Serving

Calories 220 Calories from Fat 35

% Daily Value

Total Fat 4g 8%

Saturated Fat 2.5g 12%

Polyunsaturated Fat g

Trans Fat 0g 0%

Cholesterol 25mg 9%

Sodium 100mg 4%

Total Carbohydrate 33g 11%

Dietary Fiber 0g

Sugars 32g

Protein 18g

Vitamin A 20% Vitamin C 20%

Vitamin D 20% Vitamin E 20%

Calcium 35% Iron 6%

Percent Daily Values are based on a 2,000 calorie diet.

Your daily values may be higher or lower depending on your calorie needs.

#### Ingredients

Lowfat yogurt (Pasteurized milk, skim milk, whey protein concentrate, milk protein concentrate, pectin, live active yogurt cultures (L. bulgaricus and S. thermophilus), enzymes, Vitamins A,C,D,E.) Vanilla Bean flavoring [Sugar, water, natural flavors, modified corn starch, pectin, vanilla bean seeds, annatto (color)].



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FAQs

HUNGRY? SEARCH RECIPES  
BY MEAL TYPE

Select a category

THE BEST OF  
VERMONT  
SHOWCASE

#### Cheese

- Classic Cheddar
- Specialty Aged Cheddar
- Flavored Cheddar
- Reduced Fat Cheddar
- Other Cheeses

#### Greek Yogurt

- Plain
- Lowfat Plain
- Lowfat Blueberry
- Lowfat Vanilla Bean
- Lowfat Strawberry
- Lowfat Black Cherry
- Lowfat Peach

#### Other Products

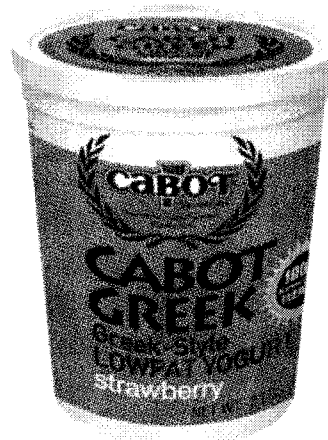
- Cream Cheese
- Whipped Cream
- Cottage Cheese
- Dips
- Sour Cream
- Butter
- Nonfat Yogurt

Plain Lowfat Plain Lowfat Blueberry Lowfat Vanilla Bean **Lowfat Strawberry** Lowfat Black Cherry Lowfat Peach

## Lowfat Strawberry Greek-Style Yogurt

Cabot's new Strawberry Greek-Style Yogurt is going to be your favorite breakfast, lunch and mid-afternoon snack. Strawberry is America's #1 yogurt flavoring, and Cabot's Greek-Style Yogurt is so thick, creamy and decadently delicious that you may not believe it's made from 2% lowfat milk. Spoon it up and enjoy!

Like 12



#### Product Options

1 LB 2 LBS

#### Product FAQ

#### Store Finder

##### Search by Product

Product Type:

Lowfat Strawberry Greek-Style Yogurt

Options:

Any

Zip Code:

Submit

##### Search by Location

City:

State:

Distance:

Less than 10 Miles

Submit

If you can't find what you're looking for, ask your local store manager to begin carrying Cabot products.

## Nutrition Facts

Serving Size 1 Cup (226g)

Servings Per Container 2

#### Amount Per Serving

Calories 220

Calories from Fat 35

% Daily Value

Total Fat 4g 8%

Saturated Fat 2.5g 5%

Polyunsaturated Fat g

Trans Fat 0g

Cholesterol 25mg 5%

Sodium 105mg 4%

Total Carbohydrate 33g 11%

Dietary Fiber 0g

Sugars 32g

Protein 18g

Vitamin A 20%

Vitamin C 35%

Vitamin D 20%

Vitamin E 20%

Calcium 35%

Iron 6%

Percent Daily Values are based on a 2,000 calorie diet.

Your daily values may be higher or lower depending on your calorie needs.

#### Ingredients

Lowfat yogurt (Pasteurized milk, skim milk, whey protein concentrate, milk protein concentrate, live active yogurt cultures (*L. bulgaricus* and *S. thermophilus*), enzymes, Vitamins A,C,D,E), Strawberry flavoring (Sugar, strawberries, water, modified corn starch, natural flavors, fruit and vegetable juice (color))

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AWARD FOR  
TASTE

NATURALLY  
GLUTEN  
FREE

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LOCAL  
FARMS  
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**HUNGRY? SEARCH RECIPES BY MEAL TYPE**

Select a category



#### Cheese

- Classic Cheddar
- Specialty Aged Cheddar
- Flavored Cheddar
- Reduced Fat Cheddar
- Other Cheeses

#### Greek Yogurt

- Plain
- Lowfat Plain
- Lowfat Blueberry
- Lowfat Vanilla Bean
- Lowfat Strawberry
- Lowfat Black Cherry
- Lowfat Peach

#### Other Products

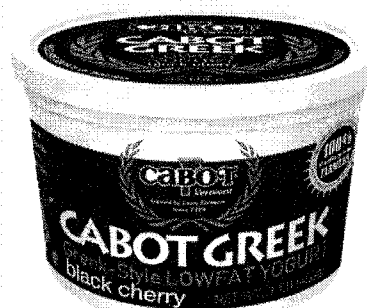
- Cream Cheese
- Whipped Cream
- Cottage Cheese
- Dips
- Sour Cream
- Butter
- Nonfat Yogurt

Plain Lowfat Plain Lowfat Blueberry Lowfat Vanilla Bean Lowfat Strawberry **Lowfat Black Cherry** Lowfat Peach

## Lowfat Black Cherry Greek-Style Yogurt

Enjoy a modern, healthy version made from 2% low-fat milk, of this deep, dark and delicious Black Cherry flavor. Too good to pass up!

Like 0



#### Product Options

1 LB.

#### Store Finder

Search by Product	Search by Location
<b>Product Type:</b> Lowfat Black Cherry Greek-Style Yogi	<b>City:</b>
<b>Options:</b> Any	<b>State:</b>
<b>Zip Code:</b>	<b>Distance:</b> Less than 10 Miles
<input type="button" value="Submit"/>	<input type="button" value="Submit"/>

If you can't find what you're looking for, ask your local store manager to begin carrying Cabot products.

## Nutrition Facts

Serving Size 1 Cup (226g)

Servings Per Container 2

Amount Per Serving	
<b>Calories 250</b>	<b>Calories from Fat 40</b>
<b>% Daily Value</b>	
<b>Total Fat 4g</b>	<b>6%</b>
<b>Saturated Fat 2.5g</b>	<b>13%</b>
<b>Polyunsaturated Fat 0g</b>	
<b>Mono Saturated Fat 0g</b>	
<b>Trans Fat 0g</b>	<b>0%</b>
<b>Cholesterol 25mg</b>	<b>8%</b>
<b>Sodium 115mg</b>	<b>5%</b>
<b>Total Carbohydrate 36g</b>	<b>12%</b>
<b>Potassium 0mg</b>	<b>0%</b>
<b>Dietary Fiber 0g</b>	
<b>Sugars 30g</b>	
<b>Protein 18g</b>	<b>36%</b>
<b>Vitamin A 20%</b>	<b>Vitamin B 0%</b>
<b>Vitamin C 20%</b>	<b>Vitamin D 20%</b>
<b>Vitamin E 0%</b>	<b>Calcium 45%</b>
<b>Iron 4%</b>	<b>Riboflavin 0%</b>

Percent Daily Values are based on a 2,000 calorie diet.

Your daily values may be higher or lower depending on your calorie needs.

#### Ingredients

Lowfat yogurt (Pasteurized milk, skim milk, whey protein concentrate, milk protein concentrate, live active yogurt cultures (Acidophilus, Bifidus, L. bulgaricus and S. thermophilus), enzymes, Vitamins A, C, D, E), black cherry flavoring (fructose, cherries, water, sugar, modified corn starch, natural flavors, pectin, oligofructose, citric acid).



Visit us in **BEAUTIFUL VERMONT**



STORE **FINDER**



**CABOT**  
E-NEWSLETTER



We're Cabot | Quality Products | Recipes & Pairings | Your Health | Healthy Schools & Groups | Visit Us | Shop Online

Classic Cheddar Specialty Aged Cheddar Flavored Cheddar Reduced Fat Cheddar Other Cheeses Greek Yogurt Other Products

**Quicklinks**

**Store Finder**

**Cabot e-Newsletter**

**FAQs**

**HUNGRY? SEARCH RECIPES BY MEAL TYPE**

Select a category



#### Cheese

- Classic Cheddar
- Specialty Aged Cheddar
- Flavored Cheddar
- Reduced Fat Cheddar
- Other Cheeses

#### Greek Yogurt

- Plain
- Lowfat Plain
- Lowfat Blueberry
- Lowfat Vanilla Bean
- Lowfat Strawberry
- Lowfat Black Cherry
- Lowfat Peach

#### Other Products

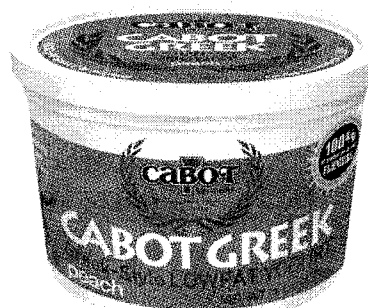
- Cream Cheese
- Whipped Cream
- Cottage Cheese
- Dips
- Sour Cream
- Butter
- Nonfat Yogurt

Plain Lowfat Plain Lowfat Blueberry Lowfat Vanilla Bean Lowfat Strawberry Lowfat Black Cherry **Lowfat Peach**

## Lowfat Peach Greek-Style Yogurt

Say goodbye to bland and discover the full, rich flavors of our Greek-Style Yogurt! Enjoy this peach-y delicious lowfat snack or lunch made with 2% milk. So thick, creamy and decadently delicious you won't believe it's only 2% milkfat.

Like 0



#### Product Options

1 LB

#### Recipes

#### Store Finder

Search by Product	Search by Location
<b>Product Type:</b> Lowfat Peach Greek-Style Yogurt	<b>City:</b>
<b>Options:</b> Any	<b>State:</b>
<b>Zip Code:</b>	<b>Distance:</b> Less than 10 Miles
<b>Submit</b>	<b>Submit</b>

If you can't find what you're looking for, ask your local store manager to begin carrying Cabot products.

## Nutrition Facts

Serving Size 1 Cup (226g)  
Servings Per Container 2

Amount Per Serving	
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Total Fat 4g	6%
Saturated Fat 2.5g	13%
Polyunsaturated Fat 0g	
Mono Saturated Fat 0g	
Trans Fat 0g	0%
Cholesterol 25mg	8%
Sodium 0mg	0%
Total Carbohydrate 35g	12%
Potassium 0mg	0%
Dietary Fiber 0g	
Sugars 28g	
Protein 18g	36%
Vitamin A 20%	Vitamin B 0%
Vitamin C 20%	Vitamin D 20%
Vitamin E 20%	Calcium 45%
Iron 4%	Riboflavin 0%

Percent Daily Values are based on a 2,000 calorie diet.

Your daily values may be higher or lower depending on your calorie needs.

#### Ingredients

Lowfat yogurt (pasteurized milk, skim milk, whey protein concentrate, milk protein concentrate, live active yogurt cultures (acidophilus, bifidus, L. bulgaricus and S. thermophilus), enzymes, Vitamins A, C, D, E, Peach flavoring (sugar, peaches, water, modified corn starch, natural flavors, annatto).



Visit us in BEAUTIFUL VERMONT



STORE FINDER



CABOT e-NEWSLETTER

**EXHIBIT B**

# Whey Proteins

**Agri-Mark**

## AGRI-MARK WHEY PROTEIN CONCENTRATE 80

Agri-Mark Whey Protein Concentrate 80 (WPC 80) is a homogeneous, free-flowing whey protein concentrate powder manufactured from fresh sweet whey and spray dried to 80% protein on a dry basis. It is used in infant formulas, sports nutrition, low carbohydrate diet formulas, yogurt, ice cream, sausage and meat products, and egg albumen replacer in bakery products. It provides an excellent source of undenatured dairy protein to a variety of processed and special dietary food formulations. Agri-Mark WPC 80 is light cream to cream in color with a bland and clean odor and flavor.

Analytical Information	Specification	Typical
Protein (N * 6.38) dry basis	80.0% minimum	>81.0%
Fat	8.5% maximum	<5.5%
Ash	4.5% maximum	<3.0%
Moisture	6.0% maximum	<5.3%
Carbohydrates		<10.0%
pH (10% solution)	6.0 minimum	6.3
Scorched particles	15.0 mg maximum	7.5 mg

### Microbiological Information

Standard plate count	30,000/g maximum	<500/g
Coliform	30/g maximum	<10/g
Yeast	50/g maximum	<30/g
Mold	50/g maximum	<30/g
Salmonella (in 750 grams)	Negative	Negative

### Packaging and Storage Information

Available in 20 kg net weight Kraft paper bags with a polyethylene liner or 1000 pound (454 kg net) weight superbags. Dairy products are hygroscopic and will absorb odors. Storage in a cool, dry environment below 85°F (29°C) and below 65% relative humidity is recommended for maximum shelf life stability.

*The information contained herein is offered solely for informational purposes and is, to the best of our knowledge, correct. No warranties, expressed or implied, are made. Purchaser is solely responsible for ensuring that product supplied is in conformity with all relevant food legislation and should determine whether suggested data, formulations or procedures are suitable for their own purposes. It is recommended that product be laboratory evaluated prior to inclusion into other products. Any information provided should not be construed as permission for violation of patent and/or trademark rights.*



Whey Processing Control Room

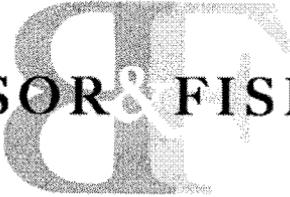


Niro Ultrafiltration Systems

*The information contained herein is offered solely for informational purposes and is, to the best of our knowledge, correct. No warranties, expressed or implied, are made. Purchaser is solely responsible for ensuring that product supplied is in conformity with all relevant food legislation and should determine whether suggested data, formulations or procedures are suitable for their own purposes. It is recommended that product be laboratory evaluated prior to inclusion into other products. Any information provided should not be construed as permission for violation of patent and/or trademark rights.*

**Agri-Mark**

**EXHIBIT C**



**BURSOR & FISHER**  
P.A.

369 LEXINGTON AVENUE  
10<sup>TH</sup> FLOOR  
NEW YORK, NY 10017  
[www.bursor.com](http://www.bursor.com)

SCOTT A. BURSOR  
Tel: 212-989-9113  
Fax: 212-989-9163  
[scott@bursor.com](mailto:scott@bursor.com)

August 30, 2012

**Via Certified Mail - Return Receipt Requested**

Cabot Creamery Cooperative, Inc.  
1 Home Farm Way  
Montpelier, VT 05602

Re: *Notice Letter Pursuant to California Civil Code § 1782 and Cal. Com. Code § 2607.*

To Whom It May Concern:

This letter serves as a preliminary notice and demand for corrective action by Cabot Creamery Cooperative, Inc. ("Cabot") California Civil Code § 1782 and Cal. Com. Code § 2607(3)(A), on behalf of our client, Timothy Smith, and all other persons similarly situated.

This notice concerns Cabot Greek, which Cabot markets as "Greek-Style Yogurt." Packages of Cabot Greek are affixed with the label "LOWFAT YOGURT." However, Cabot Greek contains Milk Protein Concentrate ("MPC"), which is prohibited by the Standards of Identity for yogurt products promulgated by the U.S. Food and Drug Administration ("FDA"). See 21 C.F.R. §§ 131.200, 131.203. Therefore, Cabot Greek is not yogurt.

Mr. Smith is a purchaser of Cabot Greek. Cabot expressly represented to him that Cabot Greek was yogurt. Cabot breached that express warranty because Cabot Greek is not yogurt. See Cal. Com. Code § 2607(3)(A).

We hereby demand that Cabot immediately (1) cease and desist from continuing to label and sell Cabot Greek as "yogurt," (2) issue an immediate recall of any Cabot Greek product bearing false labels representing the product is yogurt; and (3) make full restitution to all purchasers of Cabot Greek of all purchase money obtained from sales thereof.

We also demand that Cabot preserve all documents and other evidence which refer or relate to any of the above-described practices including, but not limited to, the following:

1. All documents concerning the ingredients, formula, and manufacturing process for Cabot Greek;

BURSOR & FISHER  
P.A.

PAGE 2

2. All communications with the FDA concerning Cabot Greek or MPC's;
3. All documents concerning the advertisement, marketing and/or sale of Cabot Greek; and
4. All communications with customers concerning complaints or comments concerning Cabot Greek.

If Cabot contends that any statement in this letter is inaccurate in any respect, please provide us with your contentions and supporting documents immediately upon receipt of this letter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Scott A. Bursor". The signature is fluid and cursive, with the first name "Scott" being the most prominent.

Scott A. Bursor  
scott@bursor.com

## CIVIL COVER SHEET

12:00-4591-  
ADR ECF DMR

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

## I. (a) PLAINTIFFS

TIMOTHY SMITH, individually and on behalf of all others similarly situated

## DEFENDANTS

CABOT CREAMERY COOPERATIVE, INC. and AGRI-MARK, INC.

(b) County of Residence of First Listed Plaintiff Alameda  
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE:

IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)

Attorneys (If Known)

## II. BASIS OF JURISDICTION

(Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question (U.S. Government Not a Party)
- ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |   |                                |   |                                |                                       |
|---|---|--------------------------------|---|--------------------------------|---------------------------------------|
| Citizen of This State                   | PTF <input checked="" type="checkbox"/> 1 | DEF <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State     | PTF <input type="checkbox"/> 4 | DEF <input type="checkbox"/> 4        |
| Citizen of Another State                | <input type="checkbox"/> 2                | <input type="checkbox"/> 2     | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5     | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3                | <input type="checkbox"/> 3     | Foreign Nation  | <input type="checkbox"/> 6     | <input type="checkbox"/> 6            |

## IV. NATURE OF SUIT

(Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee (Prisoner Petition) <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 895 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

## V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from another district (specify)
- ☐ 6 Multidistrict Litigation

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
28 U.S.C. Section 1331

## VI. CAUSE OF ACTION

Brief description of cause:

Plaintiff alleges that Defendants misbranded their Greek yogurt.

## VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

## IX. DIVISIONAL ASSIGNMENT (CIVIL R. 3-2)

(Place an "X" in One Box Only)

☒ SAN FRANCISCO/OAKLAND ☐ SAN JOSE ☐ EUREKA

DATE 08/31/2012

SIGNATURE OF ATTORNEY OF RECORD

ORIGINAL